STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 20, 2011
v	No. 297393 Oakland Circuit Court
STEPHEN LAWRENCE FLOYD, Defendant-Appellant.	LC No. 2009-228234-FC

Before: M. J. KELLY, P.J., and OWENS and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions on four counts of criminal sexual conduct in the first degree. MCL 750.520b(1)(b)(i). The trial court sentenced defendant as a second habitual offender, see MCL 769.10, to serve 20 to 40 years in prison for each conviction. Because we conclude that there were no errors warranting a new trial, we affirm defendant's convictions. However, we agree that the trial court erred when it sentenced defendant to lifetime electronic monitoring. Therefore, we vacate that portion of the judgment of sentence and remand for the ministerial task of correcting the judgment of sentence.

We shall first address defendant's argument that his trial counsel was ineffective. Whether a defendant had the effective assistance of counsel is a mixed question of fact and law; this Court reviews questions of law de novo, but reviews the trial court's factual findings—if any—for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). When the trial court has not held an evidentiary hearing to determine the facts, as is the case here, this Court's review is limited to mistakes that are evident on the record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999).

In order to establish a claim for ineffective assistance of counsel, defendant must show that his trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for the errors, the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). There is a strong presumption that a defendant's trial counsel's decisions were a matter of trial strategy; and the defendant bears the burden of overcoming that presumption. *Strickland v Washington*, 466 US 668, 689-690, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant argues that his trial counsel's decision not to call various witnesses fell below an objective standard of reasonableness. In addition, he argues that his trial counsel should have consulted with or called a medical expert and an expert on the attributes of a sexual perpetrator and "adolescent claims of unfounded sexual abuse." Furthermore, defendant contends that defense counsel failed to present evidence of defendant's medical records and failed to introduce evidence from a supplemental police report to rebut testimony presented by the victim and the victim's mother. Whether to call or question witnesses or present specific evidence are matters of trial strategy and this Court will not second-guess matters of trial strategy on appeal. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). In order to rebut the presumption that the decision not to call a witness was sound trial strategy, defendant must show that, under objective standards, a reasonable lawyer would have called the witness and that, had defendant's trial counsel called the witness, the outcome would likely have been different. See, e.g., *People v Johnson*, 451 Mich 115, 122-124; 545 NW2d 637 (1996) (holding that the defendant was deprived of the effective assistance of counsel where the defendant's trial counsel unreasonably failed to call additional witnesses who could have testified that the defendant did not shoot the victim even though one witness did testify to that effect at trial).

Defendant's theory of the case was that he was the victim of false allegations. And, to that end, his trial counsel competently cross-examined the prosecution's witnesses, presented witnesses who called into question the victim's truthfulness, and presented evidence that the victim—contrary to her testimony—did not live with defendant until she was 16 years old. Moreover, during defendant's trial, defendant acknowledged on the record that he understood and agreed with counsel's decision to only call certain witnesses. We can imagine a variety of valid reasons for choosing not to call additional witnesses or presenting additional evidence, including the need to maintain consistency in defendant's theory. Accordingly, defendant has not overcome the presumption that his trial counsel's decision not to call these witnesses was a matter of sound trial strategy.

In addition, we cannot conclude, on this record, that the decision to not use defendant's medical records and the police report fell below an objective standard of reasonableness under prevailing professional norms. Defendant's theory of the case was that the victim's allegations were false. And, although the medical records could have more clearly established defendant's physical limitations, the prosecutor did not argue that defendant used force to perpetrate the rapes; rather, the prosecutor argued that defendant manipulated the victim into the sexual encounters. Defendant did not establish how his medical records could have been used to support his theory of the case. In addition, although the police report appeared to corroborate defendant's claim that the victim was 16, from the context of the report it appears that this date was a typographical error. Thus, the report might not have been very helpful to the defense and, instead, might have served to corroborate the victim's version of events. Consequently, defendant has not established that his trial counsel's decision not to use these pieces of evidence constituted the ineffective assistance of counsel.

Defendant also contends that his trial counsel was ineffective for failing to give him proper advice concerning the possibility that his convictions might be used to impeach him. Defendant had the fundamental right to testify in his own defense. *People v Solomon*, 220 Mich App 527, 533-534; 560 NW2d 651 (1996). "If the accused expresses a wish to testify at trial, the trial court must grant the request, even over counsel's objection." *People v Simmons*, 140 Mich

App 681, 685; 364 NW2d 783 (1985). But, if a criminal defendant "acquiesces in his attorney's decision that he not testify, 'the right will be deemed waived.'" *Id*. (citation omitted). Here, the record reveals that defendant waived any error because he knowingly and voluntarily chose not to testify after receiving advice from counsel. Additionally, defendant fails to present an offer of proof regarding what advice counsel gave him, and that, but for counsel's erroneous advice, he would have testified. Defendant bears the burden of establishing the factual predicate of his claim. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Thus, defendant has failed to overcome the presumption that his trial counsel was effective.

Finally, defendant claims that he was denied a fair trial due to the cumulative effect of counsel's errors. However, defendant failed to establish that his counsel's decisions fell below an objective standard of reasonableness under prevailing professional norms; as such, there are no errors to aggregate and no relief is warranted. See *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999).

Defendant also asserts that the jury's verdict was against the great weight of the evidence. A defendant must timely move for a new trial below to properly preserve a challenge that the jury's verdict was against the great weight of the evidence. *People v Horn*, 279 Mich App 31, 40-41; 755 NW2d 212 (2008). This Court reviews unpreserved claims of error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A verdict is against the great weight of the evidence when "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). Conflicting testimony, even when impeached to some extent, is not a sufficient ground for granting a new trial, *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001), because the question of witness credibility should be left to the trier of fact, *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998).

In order to convict defendant under MCL 750.520b(1)(b)(i), the prosecutor had to show that defendant engaged in "sexual penetration with another person", that the person was "at least 13 but less than 16 years of age", and that defendant was "a member of the same household as the victim." This case presented the jury with a clear credibility contest between the victim and defendant's witnesses. The victim testified that she was—at the time of the events at issue—a 15-year-old member of defendant's household. She further described how defendant repeatedly sexually penetrated her over a period of time. In contrast, defendant's wife testified that the victim did not live in the household until she was 16. Additionally, defendant's trial counsel presented other witnesses who testified that the victim had a reputation for untruthfulness, while the victim and the victim's mother denied that the victim had a reputation for untruthfulness. The jury was afforded the opportunity to observe the witnesses and evaluate the credibility of their testimony. Therefore, the jury's verdict did not result in a miscarriage of justice and a new trial is not warranted.

Defendant also asserts that there was insufficient evidence to uphold his convictions. When reviewing a claim of insufficient evidence, this Court reviews the record de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Roper*,

286 Mich App 77, 83; 777 NW2d 483 (2009). "In reviewing the sufficiency of the evidence, this Court must not interfere with the jury's role as the sole judge of the facts." *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005).

Examining the record as a whole in the light most favorable to the prosecution, we conclude that a rational trier of fact could find that the prosecutor proved each of the elements beyond a reasonable doubt. The victim testified that defendant inserted his fingers and penis into her vagina at least 10 times and inserted his tongue into her vagina at least once when she was 15 years old and living in the same household with defendant. Likewise, the victim's mother testified that the victim and defendant were members of the same household when the victim was 15 years old. Even though defendant submitted contradictory evidence, it was for the trier of fact to determine the weight and credibility of the proofs. *Lemmon*, 456 Mich at 642-643. And we will not second-guess the jury's resolution of the competing proofs. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002) ("It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.").

Defendant argues that the trial court also erred when calculating his Prior Record Variables (PRV) and Offense Variables (OV) under the sentencing guidelines. Specifically, he argues that the trial court erred when it scored PRV 1 at 25 points, OV 4 at 10 points, and OV 10 at 10 points. This Court reviews de novo the proper interpretation and application of the sentencing guidelines. *People v Bemer*, 286 Mich App 26, 31; 777 NW2d 464 (2009). The trial court must score the PRVs and OVs as provided under the guidelines; it does not have the discretion to decline to score them or to score them differently than provided by statute. *Id.* at 32. However, this Court reviews for clear error the factual findings underlying a trial court's decision to score a particular variable. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). This Court must affirm a sentence within the applicable guidelines range, absent an error in the scoring or reliance on inaccurate information in determining the sentence. MCL 769.34(10).

Under MCL 777.51(1)(c), the trial court had to score PRV 1 at 25 points if "[t]he offender has 1 prior high severity felony conviction." In September 1991, defendant was sentenced to lifetime probation for his possession with intent to deliver less than 50 grams of a controlled substance conviction. See MCL 333.7401(2)(a)(iv). Possession with intent to deliver less than 50 grams of a controlled substance is a class D felony, MCL 777.13m, and therefore, it qualifies as a prior high severity felony conviction. See MCL 777.51(2).

Nevertheless, defendant argues that more than 10 years has passed between the date of his prior drug conviction and the date of this felony conviction, and, therefore, his prior drug conviction cannot be used to score PRV 1 at 25 points. MCL 777.50 provides:

> (1) [i]n scoring prior record variables 1 to 5, do not use any conviction or juvenile adjudication that precedes a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication.

> (2) Apply subsection (1) by determining the time between the discharge date for the prior conviction or juvenile adjudication most recently preceding the commission date of the sentencing offense. If it is 10 or more years, do not use that prior conviction or juvenile adjudication and any earlier conviction or juvenile adjudication in scoring prior record variables. If it is less than 10 years, use that prior conviction or juvenile adjudication in scoring prior record variables and determine the time between the commission date of that prior conviction and the discharge date of the next earlier prior conviction or juvenile adjudication. If that period is 10 or more years, do not use that prior conviction or juvenile adjudication and any earlier conviction or juvenile adjudication in scoring prior record variables. If it is less than 10 years, use that prior conviction or juvenile adjudication in scoring prior record variables and repeat this determination for each remaining prior conviction or juvenile adjudication until a period of 10 or more years is found or no prior convictions or juvenile adjudications remain.
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> (3) If a discharge date is not available, add either the time defendant was sentenced to probation or the length of the minimum incarceration term to the date of the conviction and use that date as the discharge date.

This Court held that in determining whether the 10 year gap rule applies the issue is "whether, starting with the present offense, there was ever a gap of 10 or more years between a discharge date and a subsequent commission date that would cut off the remainder of his prior convictions or juvenile adjudications." *People v Billings*, 283 Mich App 538, 552; 770 NW2d 893 (2009). According to the presentence investigation report (PSIR), defendant was sentenced to lifetime probation for his prior possession with intent to deliver less than 50 grams of a controlled substance conviction, and it appears that he was never discharged from lifetime probation. Consequently, there is not a 10 year gap between a discharge date and the subsequent commission date because defendant was never discharged from his lifetime probation sentence. The trial court properly scored PRV 1 at 25 points.

Under MCL 777.34(1)(a), the trial court had to score OV 4 at 10 points if "[s]erious psychological injury requiring professional treatment occurred to a victim." Further, MCL 777.34(2) states: "[s]core 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." The victim's expression of fearfulness is enough to satisfy the statute. *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009). At sentencing, the trial court noted that the victim was very emotional during her testimony and at trial the victim stated that she was fearful of defendant and upset over how the family was torn apart because of the sexual assaults. This evidence was sufficient to support the trial court's finding and uphold the scoring of OV 4 at 10 points.

Under MCL 777.40(1)(b), the trial court had to score OV 10 at 10 points if "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." Here, the trial court noted that there was evidence that defendant, who was well past the age of majority and the victim's uncle, engaged in sexual penetration with the victim, who was 15 years old, legally blind, and living in the same household. Thus, there was ample evidence to support the trial

court's finding that defendant exploited the victim's youth, physical disability, familial relationship, and his position of authority. See, e.g., *People v Phelps*, 288 Mich App 123, 136; 791 NW2d 732 (2010). The trial court properly scored OV 10 at 10 points.

There were no scoring errors and, for that reason, defendant is not entitled to be resentenced. *People v Francisco*, 474 Mich 82, 88-92; 711 NW2d 44 (2006).

Defendant argues also that the Michigan sentencing guidelines are unconstitutional under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Our Supreme Court has determined that our sentencing scheme does not implicate the rule stated in *Blakely*. See *People v Drohan*, 475 Mich 140, 159-160; 715 NW2d 778 (2006). And this Court is bound by that determination. See *People v Mitchell*, 428 Mich 364, 369-370; 408 NW2d 798 (1987). Consequently, this claim is without merit.

Finally, defendant contends that the trial court erred in sentencing him to lifetime electronic monitoring. This Court reviews de novo the proper interpretation of a statute. *Bemer*, 286 Mich App at 31. A trial court must, under certain circumstances, sentence a defendant convicted of criminal sexual conduct in the first degree to lifetime electronic monitoring: "In addition to any other penalty imposed under subdivision (a) or (b), the court shall sentence the defendant to lifetime electronic monitoring under section 520n." MCL 750.520b(2)(d). Under MCL 750.520n, "[a] person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring . . . ."

Although the prosecution argues that the Legislature intended to provide mandatory lifetime electronic monitoring for all persons convicted of first-degree criminal sexual conduct with MCL 750.520b(2)(d), that interpretation is not supported by a plain reading of the statute. Specifically, MCL 750.520b directs the trial court to MCL 750.520n to determine if lifetime electronic monitoring is mandatory. Under MCL 750.520n, lifetime electronic monitoring is only mandatory when the defendant is 17 years of age or older and the victim is younger than 13 years old. *See People v Kern*, 288 Mich App 513, 519; 794 NW2d 362 (2010) ("Standing alone, the terms of MCL 750.520c and MCL 750.520n indicate that all defendants convicted of second-degree CSC for conduct committed by an individual 17 years of age or older against an individual less than 13 years old are subject to lifetime electronic monitoring, without exception."). The victim here was older than 13 at the time of the assaults, therefore, MCL 750.520n does not apply. Accordingly, we vacate the trial court's judgment to the extent that it ordered defendant to be subject to lifetime electronic monitoring.

Affirmed, but remanded for the ministerial task of correcting the judgment of sentence. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Donald S. Owens
/s/ Stephen L. Borrello